WISMA COSWAY MANAGEMENT CORPORATION
v. DUBON BHD

COURT OF APPEAL, PUTRAJAYA
HAMID SULTAN ABU BACKER JCA
HANIPAH FARIKULLAH JCA
KAMALUDIN MD SAID JCA
[CIVIL APPEAL NO: J-02(A)-768-04-2018]
9 JANUARY 2019

COMPANY LAW: *Winding up – Proceedings against company – Leave to proceed claim against company as proprietor – Application for – Management corporation claimed for outstanding sums due and owed by company – Whether management corporation entitled to recover from proprietor guaranteed sum under s.77 of Strata Management Act 2013 – Argument on true construction of s. 77 – Whether outcome may have effect on stake holders in strata properties – Whether claim involved serious and complex issues – Whether in public interest for leave to be allowed - Prima facie case – Whether established*

LAND LAW: *Strata title – Management corporation – Claim for outstanding sums due and owed by company as proprietor – Whether management corporation entitled to recover from proprietor guaranteed sum under s. 77 of Strata Management Act 2013 – Whether there was mandatory obligation on proprietors to pay amount incurred by management corporation in the course of the exercise of carrying out its duties – Whether proprietors must settle outstanding amount before selling or transferring of properties – Whether Limitation Act 1953 applied to proceedings in Strata Tribunal – Whether payment of management charges amounts to running account – Strata Management Act 2013, s. 105(2)*

STATUTORY INTERPRETATION: *Interpretation of Act – 'shall by virtue of this section be guaranteed by the proprietors' – Strata Management Act 2013, s. 77 –Whether there was mandatory obligation on proprietors to pay amount incurred by management corporation in the course of the exercise of carrying out its duties – Whether proprietors must settle outstanding amount before selling or transferring of properties – Whether a condition precedent in legal documents of transfer or sales of strata unit shares*

The appellant was the management corporation for a Strata Development, Wisma Cosway, while the respondent was a proprietor for one of the units of Wisma Cosway. Pursuant to the Strata Management Act 2013 ('the Act'), the respondent was required to pay the monthly maintenance charges and sinking fund to the appellant. Subsequently, the respondent was wound up by the High Court. To date, the respondent refused to pay the monthly maintenance charges on grounds that it had been wound up. The respondent initiated a claim against the appellant and a developer, Stephens Properties Sdn Bhd ('Stephens') at the Strata Tribunal claiming (i) an order to compel Stephens to execute the memorandum of transfer for the strata title without

the imposition of any administrative and application fees; and (ii) an order to compel the appellant to issue a letter of clearance upon the respondent's payment of RM43,805.34 being settlement of the outstanding outgoings that was lawfully due to the second respondent. The appellant filed a defence and counterclaim against the respondent for the outstanding outgoings of RM183,201.37 being the sum owed and due by the respondent for maintenance fee, sinking fund and other charges in respect of the said unit pursuant to the Act. The appellant filed a leave application for, *inter alia*, that the applicant be given consent to file cause papers including the defence and counterclaim against the respondent at the Strata Tribunal and/or at any civil court including a judicial review. The respondent opposed the leave application. The Judicial Commissioner ('JC'), in refusing to grant leave to the appellant, held that the appellant had failed to satisfy the requirement for him to grant the appellant with leave to proceed with a claim against the respondent. The Court also held that the appellant failed to establish a *prima facie* case that its claim against the respondent involved serious and complex legal and factual issues. The appellant appealed against the said decision. The issues that arose were (i) whether the JC had erred when he failed to realise that the Strata Tribunal had already seized jurisdiction pursuant to s. 106 of the Act; (ii) whether the JC failed to appreciate that the Strata Tribunal had also granted the right to representation to the parties pursuant to s. 110(2) of the Act and had stayed the proceeding till the issue of leave was resolved by the appellant; (iii) whether the JC had erred when he failed to appreciate that the High Court lacked the jurisdiction to deal with the matter whilst the Strata Tribunal seized jurisdiction to deal with the matter; and (iv) whether the JC had erred when he decided the claim by the appellant in the Strata Tribunal was caught by Limitation Act 1953.

Held (allowing appeal with costs)
Per Kamaludin Said JCA delivering the judgment of the court:

(1) The appellant was claiming the outstanding services charges, sinking fund, quit rent, fire insurance, utility, interest and others for the sum of RM183,201.37. It was argued that the amount due from the respondent was a guaranteed sum under s. 77 of the Act which was a statutory right to claim. Based on that argument, the appellant had convinced this court that there was a valid point of law needed to be further discussed to resolve the issue whether the appellant would still remain as an unsecured creditor of the respondent and subjected to the remaining assets of the respondent to be distributed *pari passu* amongst the unsecured creditors of the respondent or the amount due from the respondent being a guaranteed sum under the Act afforded the appellant a lawful preference as a secured creditor of the respondent. Most importantly, the issue of whether s. 77 of the Act applied to a wound up company. Thus, there was a *prima facie* case that the appellant's claim involved legal issues or an arguable case. (para 27)

(2) The management corporation is entitled under the Act to recover from the proprietor the guaranteed sum in a court of competent jurisdiction or before a Tribunal as a debt due to it. Had the JC appreciated the fact that the amount due was the guaranteed sum permitted to be recovered under the Act by virtue of s. 77, he would have found that there was a *prima facie* case for leave to be granted to the appellant to proceed with its defence and counterclaim against the respondent at the Strata Tribunal proceeding. (para 28)

(3) Section 77 of the Act uses the words 'shall by virtue of this section be guaranteed by the proprietors'. The Act imposes a mandatory obligation on the proprietors to pay any amount incurred by the management corporation in the course of the exercise of any of the powers or functions or carrying out its duties or obligations. The law is such that the proprietors of strata units in the development project must settle any outstanding amount owed to the management corporation before they can sell or transfer the properties to third parties. Therefore, the settlement of any outstanding amount due and owing by the proprietors to the management corporation must be observed or followed before the transfer of the properties could be affected or executed. It had to be a condition precedent in the legal documents of transfer or sales of strata unit shares prepared by lawyers. (para 31)

(4) The argument on the true construction of s.77 of the Act had not been argued before or decided by the apex court. It becomes more important for the matter to be ventilated. The outcome may have effect on the stake holders in the strata properties industries including lawyers involved in preparing the legal documents, therefore, it was of public interest that leave should be given. Further, s. 105(2) of the Act clearly states that the Limitation Act 1953 shall not apply to proceedings of the Tribunal. The payment of management charges amounted to a running account such that limitation did not come into play. (paras 32 & 34)

Bahasa Malaysia *Headnotes*

Perayu adalah perbadanan pengurusan untuk sebuah Pembangunan Strata, Wisma Cosway, sementara responden adalah pemilik salah satu unit di Wisma Cosway. Menurut Akta Pengurusan Strata 2013 ('Akta'), responden perlu membuat bayaran caj penyelenggaraan bulanan dan dana terikat kepada perayu. Seterusnya, responden digulung oleh Mahkamah Tinggi. Sehingga kini, responden enggan membayar caj penyelenggaraan bulanan atas alasan telah digulung. Responden memulakan satu tuntutan terhadap perayu dan satu pemaju, Stephens Properties Sdn Bhd ('Stephens') di Tribunal Strata menuntut (i) satu perintah untuk Stephens melaksanakan memorandum pemindahan hak milik strata tanpa dikenakan apa-apa yuran pentadbiran dan permohonan; dan (ii) satu perintah untuk perayu mengeluarkan surat pelepasan apabila bayaran RM43,805.34 yang dibuat oleh responden sebagai

penyelesaian wang keluar tertunggak yang sah masih terhutang kepada responden kedua. Perayu memfailkan pembelaan dan tuntutan balas terhadap responden untuk pinjaman yang masih belum dilangsaikan RM183,201.37 iaitu jumlah yang masih terhutang oleh responden untuk yuran penyelenggaraan, dana terikat dan caj-caj lain berhubungan unit tersebut menurut Akta. Perayu memfailkan permohonan kebenaran untuk, antara lain, pemohon diberikan kebenaran memfailkan kertas-kertas kausa termasuk pembelaan dan tuntutan balas terhadap responden di Tribunal Strata dan/atau di mana-mana Mahkamah Sivil termasuk semakan kehakiman. Responden membantah permohonan kebenaran itu. Pesuruhjaya Kehakiman ('PK'), dalam enggan memberikan permohonan kebenaran kepada perayu, memutuskan perayu gagal memenuhi keperluan untuk PK memberikan perayu kebenaran membuat tuntutan terhadap responden. Mahkamah juga memutuskan perayu gagal membuktikan kes *prima facie* bahawa tuntutannya terhadap responden melibatkan isu-isu undang-undang dan fakta yang serius dan kompleks. Perayu merayu terhadap keputusan tersebut. Isu-isu yang timbul adalah (i) sama ada PK terkhilaf apabila gagal mengambil kira bahawa Tribunal Strata mempunyai bidang kuasa menurut s. 106 Akta; (ii) sama ada PK gagal mempertimbangkan bahawa Tribunal Strata telah memberikan hak untuk diwakil kepada pihak-pihak menurut s. 110(2) Akta dan telah menangguh prosiding sehingga isu kebenaran diselesaikan oleh perayu; (iii) sama ada PK terkhilaf apabila gagal menghargai Mahkamah Tinggi tidak mempunyai bidang kuasa untuk menangani perkara sementara Tribunal Strata mempunyai bidang kuasa untuk menangani perkara ini; dan (iv) sama ada PK terkhilaf apabila memutuskan tuntutan perayu di Tribunal Strata dihalang oleh Akta Had Masa 1953.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Kamaludin Said HMR menyampaikan penghakiman mahkamah:

(1) Perayu menuntut caj perkhidmatan, dana terikat, cukai tanah, insurans kebakaran, utiliti, faedah dan lain-lain yang masih tertunggak untuk jumlah RM183,201.37. Dihujahkan bahawa amaun yang perlu dibayar oleh responden adalah jumlah yang dijamin bawah s. 77 Akta iaitu satu hak statutori untuk menuntut. Berdasarkan hujahan itu, perayu telah meyakinkan mahkamah ini bahawa terdapat hujahan sah undang-undang yang perlu dibincangkan lagi untuk menyelesaikan isu sama ada perayu masih kekal sebagai pemiutang tidak bercagar responden dan tertakluk pada baki aset responden untuk diagihkan *pari passu* antara pemiutang tidak bercagar responden yang lain atau jumlah yang masih dihutang oleh responden sebagai jumlah yang terjamin bawah Akta memberikan perayu keutamaan yang sah sebagai pemiutang tidak bercagar responden. Paling penting, isu sama ada s. 77 Akta diguna pakai pada syarikat yang telah digulung. Oleh itu, terdapat kes *prima facie* bahawa tuntutan perayu melibatkan isu undang-undang atau kes yang boleh dipertikaikan.

(2) Perbadanan pengurusan berhak bawah Akta untuk mendapatkan daripada pemilik jumlah yang dijamin di mahkamah yang mempunyai bidang kuasa kompeten atau di hadapan Tribunal sebagai hutang yang kena dibayar kepadanya. Jika PK menghargai fakta bahawa jumlah yang perlu dibayar adalah jumlah yang dijamin yang dibenarkan untuk dipulih bawah Akta melalui s. 77, PK akan mendapati terdapat satu kes *prima facie* untuk kebenaran diberikan kepada perayu meneruskan pembelaan dan tuntutan balasnya terhadap responden di prosiding Tribunal Strata.

(3) Seksyen 77 Akta menggunakan perkataan-perkataan 'shall by virtue of this section be guaranteed by the proprietors.' Akta mengenakan kewajipan mandatori atas pemilik-pemilik untuk membayar apa-apa jumlah yang ditanggung oleh perbadanan pengurusan dalam pelaksanaan kuasa-kuasa dan fungsi-fungsinya atau dalam menjalankan tugas-tugas dan obligasi-obligasinya. Undang-undang menyatakan bahawa pemilik-pemilik unit-unit strata dalam projek pembangunan ini harus melangsaikan jumlah yang tertunggak yang masih terhutang pada perbadanan pengurusan sebelum mereka boleh menjual atau memindah milik hartanah-hartanah kepada pihak ketiga. Oleh itu, penyelesaian apa-apa amaun yang perlu dibayar oleh pemilik-pemilik kepada perbadanan pengurusan harus diperhatikan atau diikuti sebelum pindah milik hartanah-hartanah boleh dipengaruhi atau dilaksanakan. Ini adalah syarat duluan dalam dokumen-dokumen undang-undang pindah milik atau jualan saham unit strata yang disediakan oleh peguam-peguam.

(4) Hujahan berkenaan konstruksi sebenar s. 77 Akta belum lagi dihujahkan atau diputuskan oleh mahkamah tertinggi. Ini menjadikan lebih penting lagi untuk perkara ini diutarakan. Hasilnya mungkin memberi kesan kepada pihak berkepentingan dalam industri hartanah strata termasuk peguam-peguam yang terlibat dalam menyediakan dokumen undang-undang, oleh itu, kebenaran harus diberikan untuk kepentingan awam. Tambahan lagi, s. 105(2) Akta dengan jelasnya menyatakan Akta Had Masa 1953 tidak boleh diguna pakai pada prosiding-prosiding Tribunal. Pembayaran caj pengurusan terjumlah sebagai akaun berjalan yang tidak akan dihalang oleh had masa.

Case(s) referred to:

Brightvite Sdn Bhd v. Pantai Towers Management Corporation and Another Appeal [2018] 1 LNS 769 CA ***(dist)***

ECM Libra Investment Bank Bhd v. Foo Ai Meng & Ors [2013] 1 LNS 99 CA ***(refd)***

Ganda Setia Cemerlang Sdn Bhd & Anor v. Maika Holdings Bhd [2018] 2 CLJ 401 CA ***(refd)***

Gula Perak Bhd v. Datuk Lim Sue Beng & Other Appeals [2019] 1 CLJ 153 FC ***(refd)***

Kyros International Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2013] 3 CLJ 813 CA ***(refd)***

Mesuntung Property Sdn Bhd v. Kimlin Housing Development Sdn Bhd [2014] 7 CLJ 202 CA ***(refd)***

Vasudevan Vazhappulli Raman v. T Damodaran PV Raman & Anor [1981] CLJ 84; [1981] CLJ (Rep) 101 FC ***(refd)***

Legislation referred to:
Companies Act 1965 (since repealed), s. 226(3)
Companies Act 2016, s. 471
Limitation Act 1953, s. 6(1)(d)
Strata Management Act 2013, ss. 77, 105(2), 106, 110(2),
Strata Titles Act 1985, s. 45(5), (6)

Other source(s) referred to:
Crease on Legislation, 9th edn, 2008, p. 171

For the appellant - Sivabalan & Goh Wan Ping; M/s Mastura Partnership
For the respondent - Andrew Teh & Tan Chong Pei; M/s Wong Lu Peen & Tunku Alina

Reported by Suhainah Wahiduddin

JUDGMENT

Kamaludin Md Said JCA:

Introduction

[1] This is the appellant's appeal against the decision of High Court in which the learned Judicial Commissioner ("learned JC") had dismissed the appellant's application in encl. 1 for leave to defend and to proceed with the counterclaim against the respondent in the Strata Tribunal Putrajaya (Suit Claim No: TPS/W-2116-7/17).

[2] The learned Chairman in the Strata Tribunal had granted the right to representation pursuant to s. 110(2) of the Strata Management Act 2013 ("the Act") to the appellant as well as the respondent and stayed the hearing pending leave being obtained by the appellant pursuant to s. 226(3) of Companies Act 1965 and s. 471 of Companies Act 2016.

Brief Facts

[3] The appellant is the management corporation for a strata development known as "Wisma Cosway" located at No. 88, Jalan Raja Chulan, 50200 Kuala Lumpur.

[4] The respondent is a proprietor for Unit No: 22.05 on the 22nd floor of Wisma Cosway and pursuant to the Act, the respondent is required to pay the monthly maintenance charges and sinking fund to the appellant.

[5] On or about 18 January 2000, the respondent was wound up by the High Court wherein two individuals named Ooi Chee Kun and Khoo Pek Ling were appointed as the liquidators for the respondent and to date the respondent refuses to pay the monthly maintenance charges on grounds that it has been wound up.

[6] On or about 27 July 2017, the respondent initiated a claim against the appellant and a developer known as Stephens Properties Sdn Bhd at Strata Tribunal Putrajaya *vide* Claim No: TPS/W-2116-17/17 claiming the following reliefs:

(i) An order to compel Stephens Properties to execute the memorandum of transfer for the strata title issued for parcel unit No. 22.05, 22nd Floor, Wisma Cosway, No. 88, Jalan Raja Chulan, 50200 Kuala Lumpur without the imposition of any administrative and application fees amounting to 1% of the purchase price; and

(ii) An order to compel the appellant to issue a letter of clearance upon the respondent's payment of RM43,805.34 being settlement of the outstanding outgoings that is lawfully due to the second respondent as at 31 May 2017, the latest practicable date.

[7] On or about 23 August 2017, the appellant filed a defence and counterclaim against the respondent for the outstanding outgoings of RM183,201.37 from 1 August 2002 until 3 August 2017 being the sum owed and due by the respondent for maintenance fee, sinking fund and other charges in respect of the said unit pursuant to the Act.

Appellant's Leave Application

[8] The appellant's leave application filed on 2 November 2017 is for the following orders:

(a) Bahawa Pemohon diberikan kebenaran untuk memfailkan kertas-kertas kausa termasuk Pembelaan dan Tuntutan Balas terhadap Responden di Strata Tribunal, Putrajaya melalui Tuntutan No: TPS/W-216- 7/17 dan/atau di mana-mana Mahkamah Sivil termasuk Semakan Kehakiman;

(b) Kos hendaklah menjadi kos dalam kausa;

(c) Apa-apa perintah lanjutan dan/atau Mahkamah Yang Mulia ini adalah dianggap sesuai dan/atau sebaliknya wajar.

[9] The leave application is supported by the affidavit affirmed by Yap Kuen Fah dated 2 November 2017. The respondent opposed the leave application by filing its affidavit in reply affirmed by Khoo Pek Ling dated 20 November 2017 and the appellant filed its affidavit in reply dated 29 November 2017.

[10] The leave application was heard by the court and the learned JC dismissed the appellant's leave application with cost RM4,000.

Decision Of The High Court

[11] Having considered the facts and circumstance of the appellant's case and applied the test that the appellant's claim can be dealt with adequately in the winding up court, the learned JC refused to grant leave to the

appellant. The learned JC held that the appellant had failed to satisfy the requirement for him to grant the appellant with leave to proceed with a claim against the respondent. The court also held that the appellant failed to establish a *prima facie* case that its claim against the respondent involves a serious and complex legal and factual issues (the Court of Appeal's cases of *Ganda Setia Cemerlang Sdn Bhd & Anor v. Maika Holdings Bhd* [2018] 2 CLJ 401 and *Mesuntung Property Sdn Bhd v. Kimlin Housing Development Sdn Bhd* [2014] 7 CLJ 202 were followed)

[12] The reasons given by the learned JC in dismissing the appellant's leave application can be summarised as follows:

(i) The appellant's claim for the outgoings against the respondent based on the statement of account prepared as at 31 May 2017 is time barred under s. 6(1)(d) of the Limitation Act 1953.

(ii) The appellant is an unsecured creditor of the respondent and the remaining assets of the respondent must be distributed *pari passu* amongst the unsecured creditors of the company;

(iii) It will be unfair and prejudicial to the other unsecured creditors of the respondents if the appellant is granted with leave to proceed with the counterclaim at the Tribunal proceedings, as it will afford the appellant an unlawful preference as an unsecured creditor;

(iv) By allowing the application, the court will fortuitously allow the appellant to circumvent the ordinary winding-up process without filing a proof of debt;

(v) The counterclaim at the Tribunal proceeding which the appellant is seeking leave from court is monetary in nature and the correct step which should be taken by the appellant in the orderly winding-up process is to file a proof to the liquidators of the respondent;

(vi) The dispute between the appellant and the respondent does not involve a complex issue of facts and law. The appellant's claim can be sufficiently dealt by the winding-up court; and

(vii) Once the monetary dispute between parties is decided by the court, the claim at the Tribunal proceeding will be deemed academic and will not necessary to be continued.

This Appeal

[13] The appellant sets out various grounds in its memorandum of appeal. In summary, the reasons warranting appellate intervention are as follows:

(i) The learned JC erred when he failed to realise that the Strata Tribunal had already seized jurisdiction pursuant to s. 106 of the Strata Management Act 2013 as at 23 August 2017;

(ii) The learned JC failed to appreciate that the Strata Tribunal had also granted the right to representation to the parties pursuant to s. 110(2) of the Strata Management Act 2013 and had stayed the proceeding till the issue of leave being resolved by the appellant;

(c) The learned JC erred when he failed to appreciate that the High Court lacked the jurisdiction to deal with the matter whilst the Strata Tribunal seized jurisdiction to deal with the matter;

(d) The learned JC erred when he decided the claim by the appellant in the Strata Tribunal is caught by the Limitation Act 1953 despite the fact that the issue of limitation does not arise. Section 105(2) of the Strata Management Act 2013 clearly states that Limitation Act 1953 does not apply to proceeding in the Strata Tribunal.

[14] The appellant and the respondent had filed their written submissions. We had read the written submissions. Counsel had also made oral submissions before us.

[15] Having heard the submissions, it was our unanimous decision that the appellant's appeal should be allowed. We gave our reasons.

Our Decision

[16] At the outset, we gave our view to learned counsel for the respondent that the appellant's counterclaim filed at the Tribunal against the respondent would be an abuse of court process on reason that since there is already in place a statutory mechanism for resolving disputes and debts by way of lodgment of proof of debts. The respondent is in liquidation and if the claim can be obtained in the liquidation proceeding through filing of a proof of debt, leave ought to be refused. The onus is on the appellant to demonstrate why it is more appropriate in this particular facts and circumstance to proceed by separate civil action instead of by lodgment of a proof of debt.

[17] The appellant's counsel responded by submitting that the counterclaim by the appellant in Strata Tribunal is to claim the outstanding services charges, sinking fund, quit rent, fire insurance, utility, interest and others for the sum of RM183,201.37 as at 3 August 2017 and the said sum is a guaranteed sum by the respondent being the proprietor for Unit No. 22.05 pursuant to s. 77 of the Act.

[18] He explained that s. 77 of the Act states that:

> 77(1) The payment of any amount lawfully **incurred by the management corporation** or the subsidiary management corporation **in the course of the exercise of any of its powers or functions or carrying out its duties or obligations shall by virtue of this section be guaranteed by the proprietors** for the time being constituting the management corporation or the subsidiary management corporation.

A (2) **Each proprietor shall be liable under such guarantee referred to in subsection (1) only for such proportion of the money so incurred as the share units of his parcel** or the provisional share units of his provisional block bear to the aggregate share units.

(3) **Where any proprietor has not discharged or fully discharged his**
B **liability for the purpose of subsection (1), the management corporation shall be entitled to recover from the proprietor in a court of competent jurisdiction or before a Tribunal as a debt due to it**.

(emphasis added)

[19] He submitted that by sub-s. (3) above, it is very clear that any amount
C lawfully incurred by the appellant being the management corporation in this case is guaranteed by the proprietors ie, the respondent being the proprietor and the guarantor of the account for Unit No: 22.05 and therefore is legally bound to settle the outstanding sum of RM183,201.37 as at 3 August 2017. In other words, the said outstanding sum is a guaranteed sum be paid to the
D appellant.

[20] It was further submitted that the intention of s. 77 of the Act is to make the proprietor liable to pay amount lawfully incurred by the management corporation. In this case, the outstanding services charges, sinking fund, quit rent, fire insurance, utility are the amount incurred by the appellant as the
E management corporation which are guaranteed by the respondent. In other words, the guaranteed amount incurred is attached to the property held by the owner of which the respondent has not discharged or fully discharged his liability to settle the amount lawfully incurred by the appellant.

[21] It is the appellant's case that it has the right under the statute to claim
F the outstanding sum of RM183,201.37 as at 3 August 2017 against the respondent and that the respondent cannot compel Stephens Properties to execute the memorandum of transfer for the strata title issued for parcel unit No. 22.05 and compel the appellant to issue a letter of clearance for the transfer of the said unit without the outstanding sum owed and due to the
G appellant being the guaranteed amount under the said Act be paid to the appellant. The issue of the appellant filing a proof of debt does not arise or become a determining factor for the learned JC to refuse leave. The appellant had shown a *prima facie* case and leave must be given by the court for the appellant to proceed with its defence and counterclaim against the respondent
H at the Strata Tribunal proceeding.

[22] The appellant had also submitted that the learned JC erred in dismissing the appellant's application on the grounds that the appellant's claim was time barred by Limitation Act 1953. Counsel referred to s. 105(2) of the Act which clearly states that "For avoidance of doubt, the Limitation
I Act 1953 (Act 254) shall not apply to proceedings of the Tribunal". It is the appellant's case that the amount due is attached to the property and the cause

of action to recover the amount due and payable to the management corporation follows the property. The cause of action commences from the date the proprietor disposes the property.

[23] We are minded that there is a presumption that the judge had rightly exercised his discretion and the appellate court must not reverse the judge's decision on a mere "measuring cast" or on a bare balance as the mere idea of discretion involves room for choice and difference of opinion (See: *Vasudevan Vazhappulli Raman v. T Damodaran PV Raman & Anor* [1981] CLJ 84; [1981] CLJ (Rep) 101; [1981] 2 MLJ 150).

[24] It is trite that an appellate court will be slow in intervening in the discretionary exercise of the trial court. (See *Kyros International Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2013] 3 CLJ 813; [2013] 2 MLJ 650; *ECM Libra Investment Bank Bhd v. Foo Ai Meng & Ors* [2013] 1 LNS 99; [2013] 3 MLJ 35).

[25] We are also minded that generally the threshold for court in exercising its power to grant leave is very low. The function of the court in exercising its power to grant leave is to sieve through the application before it and determine that the application is not frivolous and vexatious and there is an arguable case to merit further argument at the trial.

[26] The appellant's leave application is made pursuant to s. 226(3) of the Companies Act 1965 and s. 471 of the Companies Act 2016 which provide as follows:

S. 226 of Act 1965

(3) When a winding up order has been made or a **provisional liquidator has been appointed no action or proceeding shall be proceeded with or commenced** against the company except:

(a) By **leave of the Court**; and

(b) In accordance with such terms as the Court imposes.

S. 471 of Act 2016

(1) When a winding up order has been made or an interim liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company except by leave of the Court and in accordance with such terms as the Court imposes.

(2) The application for leave under subsection (1) shall be made in the Court granting winding up order and shall be served on the liquidator.

(3) The office copy of the order for leave under subsection (1) shall be lodged by the applicant referred to in subsection 470(1) with the Registrar and with the Official Receiver within fourteen days from the making of the order.

[27] It was not disputed that the issue related to s. 77 of the Act in particular had been canvassed before the learned JC. It was argued that the amount due from the respondent is a guaranteed sum under the said s. 77 which is a statutory right to claim. Based on that argument, it is our preliminary view that the appellant had convinced us that there is a valid point of law needed to be further discussed to resolve the issue whether the appellant would still remain as an unsecured creditor of the respondent and subjected to the remaining assets of respondent to be distributed *pari passu* amongst the unsecured creditors of the respondent or the amount due from the respondent being a guaranteed sum under the Act afforded the appellant a lawful preference as a secured creditor of the respondent. Most importantly, the issue whether s. 77 of the Act applies to a wound up company. We believe that there is a *prima facie* case that the appellant's claim involves legal issues or an arguable case.

[28] It is not disputed that the test is such that if all reliefs sought may be obtained in the winding up court, then leave will be refused. However, the appellant's case can be distinguished in that the management corporation is entitled under the Act to recover from the proprietor the guaranteed sum in a court of competent jurisdiction or before a Tribunal as a debt due to it. In another Court of Appeal's case of *Brightvite Sdn Bhd v. Pantai Towers Management Corporation and Another Appeal* [2018] 1 LNS 769, it was held that the filing of the claim *vide* the proof of debt form does not preclude the MC from seeking recovery against the appellants particularly when the debt remains unpaid to date *vis a vis* Metroplex. The filing of the proof of debt form against Metroplex does not operate as an estoppel against recovery of the debt from the appellants in light of the express statutory provisions of s. 45(5) and (6) of the Strata Titles Act 1985. Debt necessarily mean that there is an undisputed debt. If the debt has been disputed in a *bona fide* manner then there is a duty and obligation for the management corporation to resolve the dispute preferably by mediation or arbitration within the members themselves failing which due process of law has to be adhered to.

[29] Be that as it may the *Brightvite*'s case is distinguished from its facts. There, the issue involves the reading of s. 45(5) and (6) of the Strata Titles Act. It does not relate to s. 77 of the Act. Premised on the argument in relation to s. 77 of the Act and the "guaranteed sum" it is our view that, had the learned JC appreciated the fact that the amount due is the guaranteed sum permitted to be recovered under the Act by virtue of s. 77 of the Act, we believed he would have found that there is a *prima facie* case for leave to be granted to the appellant to proceed with its defence and counterclaim against the respondent at the Strata Tribunal proceeding.

[30] The function of a court when construing an Act of Parliament is primarily to interpret the statute in order to ascertain what the legislative intent is; and this is primarily done by reference to the words used in the

provision (see: the Federal Court in *Gula Perak Bhd v. Datuk Lim Sue Beng & Other Appeals* [2019] 1 CLJ 153). The Federal Court cited *Crease on Legislation* (9th edn, 2008) at p. 171 which states:

> The cardinal rule for construction of legislation is that it should be construed according to the intention expressed in the language used. So the function of the Court is to interpret legislation "according to the intent of them that made it" and that intent is to be deduced from the language used.

[31] Section 77 of the Act uses the words "shall by virtue of this section be guaranteed by the proprietors". It must be accepted at the moment that the Act imposes a mandatory obligation on the proprietors to pay any amount incurred by the management corporation in the course of the exercise of any of its powers or functions or carrying out its duties or obligations. It is our preliminary view that the law is such that the proprietors of strata units in the development project must settle any outstanding amount owed to the management corporation before they can sell or transfer the properties to third parties. Therefore, the settlement of any outstanding amount due and owing by the proprietors to the management corporation must be observed or followed before the transfer of the properties can be effected or executed. This means that it has to be a condition precedent in the legal documents of transfer or sales of strata unit shares prepared by lawyers.

[32] It was pointed to us that the argument on the true construction of s. 77 of the Act has not been argued before or decided by the apex court. It becomes more important for the matter to be further ventilated. We are of the view that the outcome may have effect on the stakeholders in the strata properties industries including lawyers involved in preparing the legal documents, therefore, it is in the public interest that leave should be given.

[33] It had also been pointed out that s. 105(2) of the Act clearly states that the Limitation Act 1953 (Act 254) shall not apply to proceedings of the Tribunal. We would agree with the appellant that the payment of management charges amounts to a running account such that limitation does not come into play.

[34] In that premise, we allowed the appellant's appeal with cost of RM15,000 here and below subject to allocator fee and the deposit is to be refunded to the appellant.